NO. 47956-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES PAMPLIN,

Respondent,

vs.

SAFWAY SERVICES, LLC, a Delaware Corporation; PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation; PARKER TECHNOLOGY, INC., an Oklahoma Corporation; PARKER DRILLING COMPANY, a Delaware Corporation; THOMPSON METAL FAB, INC., an Oregon Corporation,

Appellants.

REPLY BRIEF OF APPELLANT SAFWAY SERVICES, LLC

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I. SUMMARY OF REPLY

Pamplin asserts that substantial "physical and circumstantial evidence" allowed the jury to find that Safway emplo yees caused his injury by falsely indicating the scaffold was ready for use when it was not. He cites to no such evidence. Invoking the words "physical and circumstantial evidence" is insufficient when the record contains none. No evidence of any type anchors a conclusion that Safway was responsible for the false indicia. The trial court allowed the jury to skip certain dots rather than connect them as the law requires. This Court should reverse and direct judgment to Safway.

Alternatively, the facts and law supported the giving of supervening cause instructions. Pamplin mischaracterizes both Safway's position and the requirements for the instructions when arguing that the jury should not have been allowed to judge the evidence that supports Safway's theory. The verdict was unfair because the instructions did not explain to the jury the legal consequences of "breaking the chain of causation." The jury, therefore, could not consider whether to exonerate Safway based on the evidence of acts by third parties.

II. REPLY TO RESPONDENT'S STATEMENT OF THE CASE AND FACTUAL ASSERTIONS

Pamplin prudently concedes he did not submit any testimony probative of whether Safway caused the accident by mismarking the

scaffold. *See Resp. Br.* 9-13. The parties agree, then, that no testimonial evidence connects the mismarking of the scaffold, and specifically the presence of the green tag and ladder, to conduct by Safway.

After making this significant concession, Pamplin resorts to citing "exhibits" that are not in evidence and exhibits that are not probative of whether Safway employees mismarked the scaffold. This chart summarizes Pamplin's exhibit citations purportedly relevant to who mismarked the scaffold:

Asserted Physical and Circumstantial Evidence of Causation[1]

Exhibit	Admitted	Designated	Probative of Causation?
2	Yes	Yes by Suppl. Designation[2]	No; Safway's manual is unrelated to causation
5	No	No	n/a
6	No	No	n/a
11	No	No	n/a
13	Yes	Yes by Suppl. Designation	No; the Job Safety Analysis forms are unrelated to causation
36	No	No	n/a

Exhibits 5, 6, 11 and 36 were not offered or admitted.[3] These exhibits do not assist Pamplin in supporting the verdict.

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[1] *See* CP 348-349 (Clerk's Exhibit List) (showing exhibits admitted and not admitted).

[2] To facilitate a ruling on the merits, Safway has designated Exhibits 2 and 13 for Pamplin because Pamplin failed to designate them.

[3] CP 348-349 ("N/O," which is "Not Offered.").

The two *admitted* exhibits that Pamplin cites as "physical evidence" that Safway mismarked the scaffold—Exhibits 2 and 13—are not probative of this issue.[4] Exhibit 2 is the eleven-page chapter of Safway's procedures manual addressing scaffold erection. The manual may be probative of duty and breach of duty. It is not probative of causation. The manual does not establish what Safway did or did not do on this jobsite concerning the mismarkings. The manual does not direct employees to mismark unfinished scaffolds with green tags and ladders. Pamplin cites to the portion of the manual directing that scaffolds under erection should have tags, safety signs and barricade tape "so they can be seen by users...." *Resp. Br.* 2-3 citing Ex. 2 at 8. Pamplin then cites to testimony from workers about how they *found* the scaffold (without red danger tape and with a green tag). The manual (or the testimony) is not probative of how Safway left the scaffold.

Exhibit 13 contains twenty-four pages of Job Safety Analysis forms from the jobsite, most undated. Pamplin fails to identify any page or content that constitutes substantial evidence showing that conduct by Safway caused the accident. Exhibits 2 and 13 do not establish that substantial evidence supported the jury's finding of causation.

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[4] Pamplin also references Exhibits 39 (WAC regarding height to width ratio) and 61 (policies regarding tying scaffold), *see Resp. Br.* 2, which relate to breach of duty issues, not causation.

Pamplin in a footnote argues that a Safway manager from California, Wes Baker, testified that red barricade tape is often removed when workers leave a scaffold. *Resp. Br.* 3 n. 1 citing RP 422, 454, 931. Pamplin neglects to tell the Court that Baker testified that *at this site* he did not know if the red danger tape was left up when the crew left.[5] The record does not include testimony by Baker—a regional manager who was not present at the jobsite—that red barricade tape was not up around this scaffold. The jury was not, as Pamplin urges, "entitled to credit the evidence that no red barricade tape was left around the scaffold in question." That was not the testimony. Neither did Lonnie Brown testify that red barrier tape was absent.[6] Pamplin depicts Baker's and Brown's testimony as something other than what they said.

Pamplin repeatedly directs the Court to evidence showing the state of the scaffold *when Pamplin found it.* Pamplin's attorneys assert that instead of testimonial evidence, "physical facts supported by substantial evidence" show that "[Safway's] scaffold was inappropriately marked and in a dangerous state of partial construction when Pamplin encountered it." *Resp.'s Br.*, 10, citing Ex. 2, 61 and RP 212, 475, 499, 512, 522. *See also Resp. Br.* 3-4 citing RP 474, 575 (describing how scaffold was found).

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[5] RP 422:6-14.

[6] RP 931.

This begs the question relevant to causation: *who* mismarked the scaffold? Pamplin admits that no testimonial evidence shows that Safway workers did. Neither does any admitted, substantial non-testimonial evidence.

III. REPLY ARGUMENT

In its Opening Brief, Safway showed that Pamplin never met his burden to prove proximate cause because Pamplin never introduced evidence to show that Safway was responsible for the false indicia that caused Pamplin to climb the incomplete scaffold. In response, Pamplin asserts that he did submit such evidence. Pamplin did not. Judgment should be directed to Safway.

Alternatively, reversal and a new trial are justified by the trial court's refusal to instruct the jury on superseding cause.

A. The evidence does not support the judgment because Pamplin failed to show that—of all the parties with access to the accident site—it was *Safway* who signaled that the scaffold could be climbed

Pamplin failed to meet his burden to prove that Safway proximately caused his injury.[7] Pamplin concedes that the incomplete scaffold tipped over when Pamplin climbed it based on the false signals

[7] The parties agree that the Court reviews *de novo* whether substantial evidence supports the verdict. *Resp. Br.* 8; *Op. Br.* 16. The parties agree that evidence is substantial if it would convince "an unprejudiced, thinking mind" of the truth of the premise. *See Resp. Br.* 9; *Op. Br.* 17.

indicating it was ready for use when it was not. *Resp. Br.* 4, 5.[8] Pamplin argues that sufficient evidence supports a reasonable inference that Safway employees were responsible for those false signals. Not true. No evidence supports that inference.

Many actors at the construction site could have mismarked the scaffold. Pamplin was not entitled to any presumption or benefit of the doubt that *Safway* mismarked it. Even disregarding the affirmative evidence showing that Safway left the scaffold with markings it was not ready for use, no affirmative evidence offered by Pamplin allowed the jury to conclude that Safway employees affixed the green tag or ladder. According to Pamplin's evidence, it could just as easily have been anyone else, including the welders. Proof of causation is lacking.

1. No physical or circumstantial evidence exists to show that Safway placed the false signals on the scaffold inviting Pamplin to climb it

Pamplin fails to identify substantial evidence that Safway employees mismarked the scaffold. Three witnesses, Lonnie Brown (Safway employee), Danny Johnston (Safway employee), and Randy Nix

[8] Pamplin states that "there is no dispute about the physical cause of the accident: the improperly marked and dangerously constructed scaffold tipped over and injured Pamplin." *Resp. Br.* 15. Pamplin further concedes that when he encountered the scaffold, "it was marked with a green tag indicating it was safe to use, and had a partial ladder affixed." RP 847, 900. Pamplin argues that he produced "physical and circumstantial evidence" showing Safway workers mismarked the scaffold. *Resp. Br.* 13.

(Parker employee), all testified that Safway left the scaffold with indicia it was not ready for use. Pamplin asserts that he was not required to counter this evidence through *testimonial* evidence, but could meet his burden to show that Safway was responsible for the mismarkings through physical or circumstantial evidence. *Resp. Br.* 10-11 (Pamplin could contradict the Safway employees' testimony as to how they left the scaffold through "physical evidence"). Safway agrees. Safway has never argued that Pamplin was required to offer testimonial evidence. But Pamplin offered zero evidence—testimonial or physical—sufficient to prove that Safway applied the false signals that caused the accident.

Pamplin admitted on the stand that he did not know how these signals came to be on the scaffold.[9] His lawyers never offered any evidence to fill that conceded gap. Pamplin himself testified that circumstantial evidence supported the conclusion that the day shift welders were responsible: they had been on the scaffold before he got to it; they—not Safway employees—could have altered it.[10] Further, it was undisputed the tag was affixed with welder's flux core wire, which Pamplin explained is "the wire you use when you're welding."[11]

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[9] 7/9/15 VR 899:24-900:5 (Pamplin testimony).

[10] 7/9/15 VR 852:14-854:8 (Pamplin testimony).

[11] *Id.* at 901:3-13. *See also* 7/8/15 VR 486:25-487:5 (Galloway testimony).

Pamplin's star witnesses Albert Scott[12] and Clint Galloway[13] testified they lacked knowledge of who placed the false indicia.

As demonstrated by *Marshall v. Bally's Pacwest, Inc.*,[14] where plaintiff Marshall lacked knowledge about how her accident on the treadmill occurred, the case of a plaintiff who does not know what happened is subject to dismissal. Pamplin never overcame this gap.

Without a knowledgeable witness, a plaintiff's only potential avenue to meet his burden on causation is substantial physical or circumstantial evidence. Pamplin has none. Pamplin produced no physical or circumstantial evidence to show that Safway actors were responsible. As noted, Pamplin concluded from the surrounding facts that welders may have been responsible because he knew the day shift welders had been on the scaffold before him and the green tag was affixed with a wire used by welders. The evidence conclusively showed that Safway used zip ties or very thick "9 wire" to attach tags.[15] This circumstantial evidence further shows that actors other than Safway were responsible.

Pamplin's appellate attorneys argue that "physical facts" show the scaffold was "inappropriately marked and in a dangerous state of partial

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[12] 7/7/15 VR 179:3-17.

[13] 7/8/15 VR 486:23-24.

[14] *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372 (1991).

[15] 7/10/15 VR 1105:5-1107:11 (Curry testimony).

construction when Pamplin encountered it." *Resp. Br.* 10, citing Exs. 2 and 61 and RP 212, 475, 499, 512, 522. This misses the mark. The evidentiary gap is not how the scaffold was *when Pamplin found it*, which is uncontested on appeal, but the condition in which Safway employees left it. Pamplin offered no evidence probative of who mismarked it.

Pamplin next asserts that certain "facts" "in evidence" allowed the jury to find that Safway caused the accident. *Resp. Br.* 13. Pamplin describes the following list of actions that—like his evidentiary case—skips the crucial step of causation:

> (1) Safway employees built the scaffold, RP 221; (2) Safway employees left the scaffold unfinished at the end of their shift and it was unsecured, RP 433, 587; (3) Safway employees' testimony conflicted regarding how they left the scaffold marked, RP 422, 454, 480, 931; (4) when Pamplin encountered Safway's scaffold it was mismarked as safe and had a ladder attached, RP 480; and (5) the scaffold tipped over because it was constructed contrary to regulations requiring it to be secured based on its height-to-width ratio.

Resp. Br. 13. First, taking these assertions at face value, the gap between steps (3) and (4) shows where Pamplin's case fails. Pamplin points out only that Safway workers left the scaffold and it was mismarked when Pamplin encountered it hours later. Pamplin cannot make his case by leaving out the crucial information regarding who mismarked it.

Second, Pamplin falsely depicts the testimony in his third assertion. He tells this Court that Safway employees' testimony "conflicted" "regarding how they left the scaffold marked." *Resp. Br.* 13 at

(3). No testimony conflicted on this point. Not one Safway employee testified that they left a green tag on the scaffold. Not one employee testified that they left a ladder on the scaffold. To the contrary, Lonnie Brown, Danny Johnston and Randy Nix all testified no green tag and no ladder were on the scaffold when Safway left it: indications it was not ready for use. Randy Nix further testified unequivocally that, after Safway left the jobsite for the day at 5:00 p.m., red danger tape surrounded it. Not one witness contradicted this testimony.

Safway anticipated that Pamplin would try to muddy the water with this false assertion. As discussed in Safway's Opening Brief 19, Brown and Johnston—sure that no green tag and no ladder had been left by Safway—could not recall if there was red danger tape up. Safway addressed that the failure of Brown and Johnston to recall if red danger tape was up or not is not evidence that contradicts Nix's testimony. *See Op. Br.* 19 citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430 (2002) (witness who did not recall was incompetent for lack of personal knowledge); Evidence Rule 602 (lack of knowledge makes witness incompetent on the subject). Pamplin offers no response or argument to this authority. Pamplin's misdescription of the testimony as "conflicting" cannot save the verdict.

Pamplin raises cases where physical or circumstantial evidence

sufficiently met a plaintiff's burden. *Resp. Br.* 11-12.[16] Safway does not contest the principle of these cases. They are unpersuasive here because, unlike those plaintiffs, Pamplin failed to present physical or circumstantial evidence regarding causation. Safway does not dispute that a plaintiff *may* use such evidence. Pamplin just did not.

Pamplin has only shown that, at a busy construction site with workers from different companies working 24/7 all over the site, the scaffold was improperly marked when Pamplin encountered it hours after Safway had left it. Putting aside all the evidence that shows Safway's employees did not leave it as Pamplin found it, Pamplin offers no

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[16] These cases are *Gerard v. Peasley*, 66 Wn.2d 449, 456 (1965) (despite defendant's testimony that he did not cross the center line, circumstantial evidence allowed a jury to conclude he had, including photographic evidence showing the location of damage on the vehicles, evidence of the location of glass and the windshield, the location of broken pieces of chrome metal, the skid mark, and the expert testimony of a police officer); *Leach v. Ellensburg Hosp. Ass'n*, 65 Wn.2d 925, 936 (1965) (testimony that patient complained of a burning sensation immediately upon application of cast, evidence regarding timing of adjustments to the cast and discovery of the burn, and evidence that second cast did not cause discomfort all were sufficient for jury to conclude that the burn was caused by a heat lamp and not rubbing); *State v. Jelle*, 21 Wn. App. 872, 876-77 (1978) (court affirmed refusal to give self-defense instruction despite testimony by defendant based on evidence of "shot pattern of that last shot, from the back of the head toward the front in a slightly upward direction with the pellets being imbedded in the linoleum immediately under the head. . . . Beyond all doubt, the victim was shot in the back of the head while lying facedown on the kitchen floor."); *Wise v. Hayes*, 58 Wn.2d 106, 108 (1961) (jury could conclude crop damage was caused by storage of insecticide in containers that previously held a mopping disinfectant material where evidence showed use of same insecticide from unexposed containers had not resulted in harm).

affirmative evidence (direct, circumstantial or testimonial) that an act of Safway created this mismarked condition.

2. This Court should hold Pamplin to his burden of proof

Pamplin's brief implicitly relies on viewing his evidence through a lens reminiscent of *res ipsa loquitur*, which allows the jury to infer negligence without proof of specific acts.[17] A plaintiff may invoke *res ipsa loquitur* in certain circumstances when a cause cannot be fully explained but the injury is of a type that would not ordinarily result if the defendant were not negligent.[18] Not only did Pamplin never invoke this doctrine, he would not have been entitled to its benefits.

To assert *res ipsa loquitur*, a plaintiff must show, among other elements, that the agency that caused the plaintiff's injury was in the exclusive control of the defendant.[19] That was not the case here, where Safway was only one of numerous contractors and workers with access to the site and the scaffold. This is precisely Pamplin's problem. Crediting Pamplin's evidence, someone mismarked the scaffold. Pamplin failed to admit any evidence that it was Safway. Further, to benefit from *res ipsa*

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[17] *See Curtis v. Lein*, 169 Wn.2d 884, 889 (2010); *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 792 (1997).

[18] *See Pacheco v. Ames*, 149 Wn.2d 431, 436 (2003).

[19] *Lein* at 891.

loquitur, a plaintiff must show that he did not contribute to the accident.[20] Here, the jury found Pamplin contributorily negligent.[21]

Pamplin never requested the benefit of this doctrine, but Safway raises it to emphasize the contention in Pamplin's briefing that, even without proof of specific acts by Safway, he has done enough. He argues the verdict is supported by a manual[22] showing that Safway was responsible to erect and to signal the scaffold, and by Job Safety Analysis forms,[23] whose probative value remains unexplained. This evidence does not establish that Safway caused this accident. The core of Pamplin's response is that he found the scaffold with a green tag and a ladder, so the jury could assume that Safway employees left it that way. He is not entitled to that leap. The case should not have gone to a jury.

3. Pamplin fails to distinguish Safway's authorities, which support reversal

Pamplin attempts, but fails, to distinguish the controlling cases *Marshall*, *Gardner* and *Arnold*. *See Resp. Br.* 13-19. These cases strongly support reversal. They are only distinguishable if this Court were to accept Pamplin's unsubstantiated claim that the record contains physical and circumstantial evidence that the Safway workers left the scaffold

[20] *Id.*

[21] CP 306-07.

[22] Ex. 2.

[23] Ex. 13.

improperly marked. Because the record contains no such physical or circumstantial evidence as discussed above, the cases support Safway.

Pamplin cannot overcome the principles enunciated by Division II in *Marshall* that "[t]he mere occurrence of an accident and an injury does not necessarily lead to an inference of negligence," and "[e]ven if negligence is clearly established, the respondents may not be held liable unless their negligence caused the accident."[24] Additionally, as cited in the Opening Brief, Division I in *Miller v. Likins* explained that a plaintiff must do more than show that an accident "might" have happened the way the plaintiff asserts. *Op. Br.* 20 n. 59 citing *Miller v. Likins*.[25] These principles are insurmountable for Pamplin. Pamplin tries to distinguish *Marshall* on the basis that "it is undisputed that Safway employees built and marked the scaffold, and that the negligently marked scaffold caused the injury." *Resp. Br.* 14. Pamplin noticeably does not say "it is undisputed" that *Safway* negligently marked the scaffold. *Marshall* is not distinguishable.

In attempting to distinguish *Gardner v. Seymour*,[26] Pamplin again acknowledges that "there is no dispute about the physical cause of the accident: the improperly marked and dangerously constructed scaffold

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[24] *Id.* at 378.

[25] *Miller v. Likins*, 109 Wn. App. 140, 145-47 (2001).

[26] *Gardner v. Seymour*, 27 Wn.2d 802, 809 (1947).

tipped over and injured Pamplin." *Resp. Br.* 15. Pamplin argues he met his burden to show that his causation explanation—Safway employees mismarked it—is more likely than not, as opposed to simply "as plausible" as the defendant's.[27] Pamplin did not meet this burden. It is equally plausible (if not more—considering the evidence of the welder's flux core wire) that other workers altered the scaffold. Even if Safway was negligent in how it erected the scaffold, Pamplin has produced nothing to show by a preponderance that Safway workers signaled the scaffold ready for use.

Gardner is instructive in explaining that a plaintiff who gives a jury evidence that supports two equally plausible inferences has not done enough. If the evidence presents a toss-up as to what happened, the plaintiff's burden is unmet. *Gardner* further instructs that circumstantial evidence cannot be said to support a conclusion unless the circumstantial evidence supports only one conclusion. That is not the case here.

Neither did Pamplin successfully distinguish *Arnold v. Sanstol*.[28] Recall that in *Arnold*, plaintiff presented a theory that the cab driver had a duty to avoid the collision after he knew or should have known the other driver was veering across the road. The Court reversed the verdict because no evidence permitted the jury to simply infer that the cab driver realized

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[27] *See id.*

[28] *Arnold v. Sanstol*, 43 Wn.2d 94, 99 (1953) (citing *Gardner*, 27 Wn.2d at 808 and the cases cited therein).

the problem. Similarly, no testimony was admitted to permit the jury to infer that Safway workers mismarked the scaffold.

Pamplin's case does not satisfy the explanations provided in *Marshall*, *Gardner* and *Arnold*. This Court must act as a check against giving a case to a jury that is legally insufficient, like here. Pamplin had the evidentiary burden, and was not entitled to a free pass where his evidence, at most, indicated that Safway *might* have been responsible for the indicia or others might have. "Might" is not enough.

B. Lack of instruction on supervening cause justifies a new trial

Safway demonstrated in its Opening Brief that the trial court erred as a matter of law when it denied Safway's proposed superseding cause instructions WPI 15.05 and WPI 15.01 as modified, and also abused its discretion when it missed its opportunity to correct that legal error by granting Safway a new trial. *Op. Br.* at 2-3 (Assignment of Error #2, Issue Statement #2). In response, Pamplin argues that the evidence did not justify the instruction and that the failure to instruct was harmless. Both arguments fail.

1. Pamplin does not contradict Safway's argument that review of the instructional error is *de novo*

Safway established in its Opening Brief that review of the trial court's denial of Safway's proposed instructions WPI 15.05 and WPI

15.01 is *de novo* applying the sufficiency test of *Douglas v. Freeman.*[29] *See Op. Br.* 30-31, citing *Douglas*, *supra*, and *City of Tacoma v. Belasco.*[30] Pamplin does not dispute this standard, or argue that a mixed standard applies. *See Resp. Br.* 22-24. This Court should apply the standard of review set forth by Safway.

Safway also established that when denial of a motion for a new trial involves questions of law, such as the instructional error raised here, review is *de novo*. *See Op. Br.* 31. Again, Pamplin does not dispute this standard or argue for another. *See Resp. Br.* 22-24.

2. The evidence justified the supervening cause instructions to allow a jury to resolve the conflicting theories of the case

To defend the trial court's rejection of the supervening cause instructions, Pamplin insists that the jury did not have to find a supervening cause under the evidence. Pamplin argues, for example, the evidence supported a finding that both Safway's acts and a third party's act were "concurrent" causes. *See Resp. Br.* 25-34. But Safway does not need to convince this Court that the jury would have found a supervening cause. The question is whether the jury should have been allowed to decide the issue. The jury should have.

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[29] *Douglas v. Freeman*, 117 Wn.2d 242 (1991).

[30] *City of Tacoma v. Belasco*, 114 Wn. App. 211, 214 (2002).

Pamplin begins by arguing that Safway was not entitled to the supervening cause instruction because Safway insists Safway workers were not negligent. See *Resp. Br.* 7, 25-27, 34 citing *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 814 (1987). Pamplin's argument misstates Safway's position. First, regarding Safway's first assignment of error that it was entitled to judgment as a matter of law, Safway does not insist that it was not negligent. Safway argues that even if it breached duties that were owed, such as by failing to tie the scaffold or building the scaffold with an incorrect height to width ratio, those breaches did not *cause* Pamplin's accident. Pamplin's accident was caused by the mismarkings, which Pamplin failed to show Safway created.

Second, Safway offers in the alternative a second assignment of error relevant to the jury instructions. Regarding Assignment of Error 2, Safway argues that *even if the jury could have concluded that Safway was negligent*, i.e., assuming Safway was negligent under any of Pamplin's theories, sufficient evidence justified the supervening cause instructions. This evidence included that third parties mismarked the scaffold or tampered with Safway's signals, bringing about the accident. *Op. Br.* 31-36. Thus, even if the jury concluded that Safway negligently left the scaffold incompletely constructed, the jury also could have concluded that Safway properly warned of that and another party caused the accident by

changing the signals. The Court should reject the unhelpful argument that the assignment of error fails because Safway disavows any negligence.

Pamplin also incorrectly argues that the instruction would only have been proper if the trial court had assumed that "(1) Safway was negligent in marking the scaffold, but (2) other workers later negligently and unforeseeably re-marked the scaffold in some different negligent way, and (3) that the subsequent act caused a different kind of harm than Safway's original negligent marking would have caused." *Resp. Br.* 26. The evidence need not be viewed so myopically. The trial court did not have to assume that Safway was "negligent in marking the scaffold." Pamplin argued Safway negligently failed to tie the scaffold and that Safway negligently constructed it based on the height to width ratio. The jury could have found these acts of negligence and then considered whether another party broke the chain of causation by placing the incorrect signals that invited Pamplin to mount it.

In other words, Pamplin addresses only the possibility that the jury would find Safway negligent for mismarking the scaffold. *See Resp. Br.* 26-27 ("On the other hand, if Safway workers were negligent in marking the scaffold, then other workers' changes to the scaffold would not break the causal chain between Safway's negligence and Pamplin's injuries."). This narrow view is similar to the narrow view expressed by the trial court

that the parties were simply arguing over *how* Safway left the scaffold, analogizing it to a case regarding whether a traffic light was red or green. *See Op. Br.* 34, citing 7/13/15 VR 1283:16-22 and 7/13/15 VR 1284:4 (trial court reflecting that the evidence supported only "two versions of how a scene was."). Safway has argued that the trial court lost track of the significance of the evidence that others altered the scaffold's condition. *Id.* Both Pamplin and the trial court fail to account for this evidence, which supported the instructions sought.

Both parties agree foreseeability is an issue of fact for the jury. *Op. Br.* 36-41; *Resp. Br.* 28 (accord). Pamplin cannot preserve the verdict by disputing foreseeability. But Pamplin tries based on two arguments: (1) if Safway's original negligence was "one of the actual causes" of the resulting harm, there can be no superseding cause, citing *Egede-Nissen v. Crystal Mountain, Inc.*[31]; and (2) that the type of harm suffered was not of a sufficiently different kind. *Resp. Br.* 28. These arguments, though perhaps superficially appealing, fail.

The first argument is nothing more than arguing that the jury, even if instructed on supervening cause, could reject it. True. The jury might have concluded based on both Instruction 16 (the causation instruction that the trial court gave) *and* the requested supervening cause instructions that

[31] 21 Wn. App. 130, 143 (1978).

the subsequent act of alteration of signals acted in concert with, for example, negligently leaving the scaffold unfinished to produce the accident. But the jury did not necessarily have to conclude that. The jury might have concluded that Safway properly signaled not to use the scaffold and that its negligence in leaving the unfinished scaffold was not an actual or direct cause.

The *Egede-Nissen* decision, cited by Pamplin at Respondent's Brief 28, is not on point. There, the court reasoned in affirming denial of a superseding cause instruction that a bystander's actions in attempting to assist the plaintiff were "such a natural response to the situation allegedly created by defendant's negligence as to be foreseeable as a matter of law."[32] The Court also held that a second theory to justify superseding cause was not supported by any evidence in the record and the record showed the allegedly superseding actions had been "a concurrent cause of the accident" when the plaintiff accessed a ski chair lift that the ski lift operator had negligently induced her to access at the same moment that a bystander allegedly induced her to access it.[33] That fact-specific holding cannot be compared to the evidence here, which permitted the jury to find *either* "concurrent" causes or a superseding cause.

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[32] 21 Wn. App. at 143.

[33] *Id.*

More compelling cases for determining whether the instruction should have been given were cited in the Opening Brief, such as *Little v. PPG Indus., Inc.*[34] (reversing failure to give superseding cause instruction where evidence supported plaintiff's theory) and *Hester v. Watson*[35] (instructions "must" be given on all theories to which the facts pertain).

The type of harm Pamplin suffered did not disqualify the supervening cause instruction. As argued in the Opening Brief 38-40, Safway never had the duty to prevent the hazard of third parties *mismarking* scaffolds or removing its markings at the busy construction site. The evidence showed that normally no third parties would alter the signals, which would be contrary to law and custom. Pamplin does not challenge this. Such acts were extraordinary or not foreseeable. This permitted a jury, consistent with *Albertson v. State*,[36] to hold third parties responsible for the accident who mismarked the scaffold after Safway left it with correct signals.

Pamplin confuses the issue by arguing that because the *instrumentality* of the harm is the same in both cases, i.e., the scaffold, there can be no supervening cause. But that is not the law. In *Qualls v. Golden Arrow Farms*, the instrumentality of the accident was the truck

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[34] *Little v. PPG Indus., Inc.*, 19 Wn. App. 812 (1978).

[35] *Hester v. Watson*, 74 Wn.2d 924 (1968).

[36] *Albertson v. State*, 191 Wn. App. 284 (2016).

whether the accident was caused by the truck driver's acts in parking it or by the supervening cause of children playing in the truck.[37] The Supreme Court found that the supervening cause instruction was warranted even where the instrumentality of harm was the same. Similarly, in *Little v. PPG Indus., Inc.*, the court remanded for a jury to decide upon proper instruction whether the employer's failure to warn superseded the manufacturer's failure to warn; in either event, the decedent was harmed by chemical vapors.[38] The Restatement (Second) of Torts (1965), which our Supreme Court follows,[39] acknowledges supervening cause situations where the instrumentality of the harm is the same or, put another way, where the antecedent negligence still was a substantial factor in bringing about the harm.[40] The focus is legal cause, not cause in fact.

This Court should reverse for failure to give the instructions critical to Safway's theory. Pamplin fought these instructions even though they were fair and justified under the evidence.

3. Pamplin does not overcome the presumption of harm from the failure to instruct

Safway demonstrated that the failure to instruct on superseding

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[37] *Qualls v. Golden Arrow Farms, Inc.*, 47 Wn.2d 599, 603 (1955).

[38] 19 Wn. App. at 824-25.

[39] See *Albertson v. State, supra*, at 297-98; *Campbell v. ITE Imperial Corp., supra*, 107 Wn.2d at 812-15.

[40] Rest. (Second) of Torts §§ 440, 441, 442, 442B, and 447 (App. A).

cause was harmful error. *See Op. Br.* 41-45. Pamplin's harmless error argument, *see Resp. Br.* 31-32, is meritless. Pamplin fails to overcome the presumption that instructional error is harmful.

The "sole proximate cause" portion of Instruction No. 16 was insufficient. Pamplin argues that if Safway marked the scaffold appropriately, and third parties altered it, the jury would necessarily have found for Safway based on Instruction 16. *Resp. Br.* 31. This is wrong. The Washington pattern jury instructions provide a supervening cause instruction in addition to Instruction 16 because Instruction 16 does not alone adequately cover the concept. Instruction 16 fails to adequately describe for the jury when the law will recognize acts that sever causation. Instruction 16 leaves out the concept of *breaking* the chain of causation. This was critical to Safway's theory.

Pamplin cites to portions of the closing argument where Safway tried in vain to argue that third party actions "break up their causation argument." *Resp. Br.* 32 citing RP 1417. Additionally, Pamplin points out that Safway argued elements of the foreseeability issue relevant to superseding cause, telling the jury that Safway was not required "to guard against vandalism or some other act of a third party" *Id.*, citing RP 1418. It is irrelevant that Safway retained elements of its theory in its closing statement after the trial judge had denied it the proper instructions.

Unfortunately, the jury had no basis to apply the arguments because the jury was never instructed how, under the law, these arguments could influence the result. By failing to provide the jury a road map for considering the superseding cause evidence, the trial court erroneously denied Safway a jury verdict on its theory of the case.

IV. CONCLUSION

Cases arise when a verdict must be set aside. This is one of those cases. The jury should not have received the case. Pamplin introduced no evidence that Safway actors were responsible for the mismarkings on the scaffold that caused the accident. By failing to direct judgment to Safway, the trial court gave Pamplin a free pass on causation.

Alternatively, a new trial is warranted so that Safway can present its supervening cause theory to a jury and have a *jury* decide it.

Respectfully submitted on this 21st day of April, 2016.

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APPENDIX A

Restatement of the Law, Second, Torts, § 440

Restatement of the Law, Second, Torts

Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 16 - The Causal Relation Necessary to Responsibility for Negligence

Topic 1 - Causal Relation Necessary to the Existence of Liability for Another's Harm

Title C - Superseding Cause

Restat 2d of Torts, § 440

§ 440 Superseding Cause Defined§ 440 Superseding Cause Defined

A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

COMMENTS & ILLUSTRATIONS: Comment:

a. An intervening cause is defined in § 441. The rules which determine whether an intervening force is a superseding cause are stated in §§ 442-453 and Comments thereto.

b. A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm.

CROSS REFERENCES: Digest System Key Numbers:

Negligence 62(1) et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Torts > Negligence > Causation > Proximate Cause > Intervening Causation

Restatement of the Law, Second, Torts, § 441

Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 16 - The Causal Relation Necessary to Responsibility for Negligence

Topic 1 - Causal Relation Necessary to the Existence of Liability for Another's Harm

Title C - Superseding Cause

Restat 2d of Torts, § 441

§ 441 Intervening Force Defined§ 441 Intervening Force Defined

(1) An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.
(2) Whether the active operation of an intervening force prevents the actor's antecedent negligence from being a legal cause in bringing about harm to another is determined by the rules stated in §§ 442-453.

COMMENTS & ILLUSTRATIONS: Comment on Subsection (1):

a. It is not necessary that an intervening force have been set in motion subsequent to the time when the actor's negligent conduct was committed. A force set in motion at an earlier time is an intervening force if it first operates after the actor has lost control of the situation and the actor neither knew nor should have known of its existence at the time of his negligent conduct. If the force should have been known by the actor to be existing before he has lost control of the situation, it is one of the circumstances in the light of which the negligence of the actor's subsequent conduct is to be determined.

b. "Active" and "passive" negligence. The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, although not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence.

c. Dependent and independent intervening forces. An intervening force may be dependent or independent. A dependent, intervening force is one which operates in response to or is a reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct. An independent force is one the operation of which is not stimulated by a situation created by the actor's conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act. Thus, if A carelessly exposes B to danger, the act of C in going to B's rescue, being C's reaction to B's peril, is a dependent intervening force. So too, if A carelessly allows his horse to run away, the act of B, who in attempting to check the speed of the horse diverts its course, is a dependent act, being done to check the harmful consequences of the defendant's negligence. On the other hand, if A so

loads his truck that any slight jolt may cause a part of its heavy contents to fall and, while B is trying to pass the truck, his car skids and sideswipes the truck so slightly that, were the truck properly packed, no harm would be done by it, but because of the careless packing of the truck, it causes a heavy piece of machinery to fall on a pedestrian, the act of B is an independent intervening force.

Comment on Subsection (2):

d. The active operation of an intervening force may or may not be a superseding cause which relieves the actor from liability for another's harm occurring thereafter. Whether it has this effect is determined by the rules stated in §§ 442-453. A force due to an act of a third person which is wrongful toward the other who is harmed may be only a contributory factor in producing the harm. If so, both the actor and the third person are concurrently liable. This is true although the actor's conduct has ceased to operate actively and has merely created a condition which is made harmful by the operation of the intervening force set in motion by the third person's negligent or otherwise wrongful conduct. However, while there is concurrent liability, the two forces are not concurrent causes as that term is customarily used. To be a concurrent cause, the effects of the negligent conduct of both the actor and the third person must be in active and substantially simultaneous operation. (See § 439.)

CROSS REFERENCES: Digest System Key Numbers:

Negligence 62(1) et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Torts > Negligence > Causation > Proximate Cause > Intervening Causation

Restatement of the Law, Second, Torts

Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 16 - The Causal Relation Necessary to Responsibility for Negligence

Topic 1 - Causal Relation Necessary to the Existence of Liability for Another's Harm

Title C - Superseding Cause

Restat 2d of Torts, § 442

§ 442 Considerations Important In Determining Whether an Intervening Force Is a Superseding Cause§ 442 Considerations Important In Determining Whether an Intervening Force Is a Superseding Cause

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

COMMENTS & ILLUSTRATIONS: Comment on Clause (a):

a. As to the statement in Clause (a), see § 451.

Comment on Clause (b):

b. As to the statement in Clause (b), see § 435 (2) and Comments *c* and *d*.

Comment on Clause (c):

c. As to the statement in Clause (c), see §§ 443-449.

d. The words "situation created by the actor's negligence" are used to denote the fact that the actor's negligent conduct is a substantial factor in bringing about the situation and that, therefore, the actor would be liable for creating the situation if the situation were in itself a legal injury.

Comment on Clause (d):

e. As to the statement in Clause (d), see § 452.

Comment on Clause (e):

f. As to the statement in Clause (e), see §§ 447-449.

Comment on Clause (f):

g. As to the statement in Clause (f), compare § 447 with §§ 448 and 449.

CROSS REFERENCES: Digest System Key Numbers:

Negligence 62(1) et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Torts > Negligence > Causation > Proximate Cause > Intervening Causation

Restatement of the Law, Second, Torts, § 442

Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 16 - The Causal Relation Necessary to Responsibility for Negligence

Topic 1 - Causal Relation Necessary to the Existence of Liability for Another's Harm

Title C - Superseding Cause

Restat 2d of Torts, § 442B

§ 442B Intervening Force Causing Same Harm as That Risked by Actor's Conduct§ 442B Intervening Force Causing Same Harm as That Risked by Actor's Conduct

Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

COMMENTS & ILLUSTRATIONS: Comment:

a. The rule stated in this Section is a special application of the principle stated in § 435 (1), that the fact that the actor neither foresaw nor could have foreseen the manner in which a particular harm is brought about does not prevent his liability where the other conditions necessary to it exist. Compare Illustration 1 under that Section.

b. If the actor's conduct has created or increased the risk that a particular harm to the plaintiff will occur, and has been a substantial factor in causing that harm, it is immaterial to the actor's liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate. This is true not only where the result is produced by the direct operation of the actor's conduct upon conditions or circumstances existing at the time, but also where it is brought about through the intervention of other forces which the actor could not have expected, whether they be forces of nature, or the actions of animals, or those of third persons which are not intentionally tortious or criminal. This is to say that any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct.

Illustrations:

1. A negligently fails to clean petroleum residue out of his oil barge moored at a dock, thus creating the risk of harm to others in the vicinity through fire or explosion of gasoline vapor. The barge is struck by lightning and explodes, injuring B, a workman on the dock. A is subject to liability to B.

2. A negligently leaves an obstruction in the public highway, creating the risk that those using the

highway will be injured by collision with it. B's horse runs away with him and charges into the obstruction, and B is injured. A is subject to liability to B.

3. The A Telephone Company negligently allows its telephone pole, adjoining the public sidewalk but several feet from the street, to become riddled with termites, thus creating the risk that the pole will fall or be knocked over and so injure some person using the sidewalk. An automobile negligently driven by B at excessive speed leaves the highway, comes up on the sidewalk, and knocks the pole over. It falls up C, a pedestrian on the sidewalk, and injures him. A is subject to liability to C.

4. The same facts as in Illustration 3, except that the pole is knocked over by a cow's bumping into it. The same result.

5. A negligently leaves an excavation in a public sidewalk, creating the risk that a traveler on the sidewalk will fall into it. B, passing C on the sidewalk, negligently bumps into him, and knocks him into the excavation. A is subject to liability to C.

6. The A Railroad negligently derails a tank car full of gasoline and damages it, so that gasoline runs into the public street. The risk is thus created that persons using the street will be injured by fire or explosion. B, a bystander, negligently strikes a match to light his cigar. The gasoline vapor is ignited, and the resulting flash of fire injures C, a pedestrian on the sidewalk. A Railroad is subject to liability to C.

c. Intentionally tortious or criminal acts. The rule stated in this Section does not apply where the harm of which the risk has been created or increased by the actor's conduct is brought about by the intervening act of a third person which is intentionally tortious or criminal, and is not within the scope of the risk created by the original negligence. Such tortious or criminal acts may in themselves be foreseeable, and so within the scope of the created risk, in which case the actor may still be liable for the harm, under the rules stated in §§ 448 and 449. But if they are not, the actor is relieved of responsibility by the intervention of the third person. The reason usually given by the courts is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him. (Compare § 452 (2).)

Illustrations:

7. The same facts as in Illustration 5, except that B deliberately kicks C into the excavation. A is not liable to C.

8. The same facts as in Illustration 6, except that B deliberately sets fire to the gasoline to see what will happen. A Railroad is not liable to C.

9. The employees of the A Theatre Company negligently leave a chair on the railing of the balcony, creating the risk that it may accidentally or negligently be knocked off of the railing in the dark, and will injure some person below. Without any reason whatever on the part of the Theatre Company to anticipate such conduct, B, a boy attending the theatre, deliberately throws the chair off of the railing, and it falls upon C and injures him. A Theatre is not liable to C.

10. A, the owner of an office building, negligently leaves the door of the elevator shaft open and unguarded. As C is leaving the building B, impersonating an elevator boy, politely invites C to step into the shaft. C does so, falls, and is injured. A is not liable to C.

REPORTERS NOTES: This Section has been added to the first Restatement.

Illustration 1 is taken from Johnson v. Kosmos Portland Cement Co., 64 F.2d 193 (6 Cir. 1933), certiorari denied, 290 U.S. 641, 54 S. Ct. 60, 78 L. Ed. 557. Compare Moore v. Townsend, 76 Minn. 64, 78 N.W. 880 (1899), ladder in precarious position blown down by unforeseeable wind; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354 (1871), sign in dangerous position

blown down by unforeseeable wind; Mummaw v. Southwestern Tel. & Tel. Co., 208 S.W. 476 (Mo. App. 1918), rotten pole fell when supporting wires were burned through by fire; Elder v. Lykens Valley Coal Co., 157 Pa. 490, 27 A. 545, 37 Am. St. Rep. 742 (1893), coal mine refuse washed onto plaintiff's land by unforeseeable flood; Daugherty v. Hunt, 110 Ind. App. 264, 38 N.E.2d 250 (1941), automobile trunk lid fell when the car rolled off a jack.

Illustration 2 is taken from McDowell v. Village of Preston, 104 Minn. 263, 116 N.W. 470, 18 L.R.A. N.S. 190 (1908). In accord are Baldwin v. Greenwoods Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33 (1873); Williams v. San Francisco & N. W. R. Co., 6 Cal. App. 715, 93 P. 122 (1907). Compare also Brown v. Travelers Indemnity Co., 251 Wis. 188, 28 N.W.2d 306 (1947).

Illustration 3 is taken from Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950).

Compare McFetridge v. Kurn, 125 S.W.2d 912 (Mo. App. 1939), car skidding into dangerous post in middle of underpass; Shipley v. City of Pittsburgh, 321 Pa. 494, 184 A. 671 (1936), car crashing through defective bridge railing; Tobias v. Carolina Power & Light Co., 190 S.C. 181, 2 S.E.2d 686 (1939), plaintiff struck by car and thrown against exposed guy wires of light pole.

Illustration 4 is based on Mars v. Meadville Tel. Co., 344 Pa. 29, 23 A.2d 856 (1942).

Illustration 5 is taken from Village of Carterville v. Cook, 129 Ill. 152, 22 N.E. 14, 4 L.R.A. 721, 16 Am. St. Rep. 257 (1889). See also Campbell v. City of Pittsburgh, 155 Pa. Super. 439, 38 A.2d 544 (1944).

Illustration 6 is based on Watson v. Kentucky & Ind. Bridge & R. Co., 137 Ky. 619, 126 S.W. 146, 129 S.W. 341 (1910).

Compare Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53 (1925), exposed gas pipe near highway, broken when car went off of bridge and crashed into it; Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N.E. 612 (1929), automobile flooded with gasoline, ignited by attempt to start the car; Sullivan v. Alabama Power Co., 246 Ala. 262, 20 So. 2d 224 (1944), child's toy parachute caught in uninsulated power line, plaintiff injured trying to get it down; Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955), truck knocked over power line pole, plaintiff injured coming in contact with wire while trying to get back on highway at a distant point.

Illustration 7 is based on Milostan v. City of Chicago, 148 Ill. App. 540 (1909); Alexander v. Town of New Castle, 115 Ind. 51, 17 N.E. 200 (1888); Loftus v. Dehail, 133 Cal. 214, 65 P. 379 (1901); Miller v. Bahmmuller, 124 App. Div. 558, 108 N.Y.Supp. 924 (1908).

Illustration 8 is based on Watson v. Kentucky & Ind. Bridge & R. Co., 137 Ky. 619, 126 S.W. 146, 129 S.W. 341 (1910). Cf. Seith v. Commonwealth Elec. Co., 241 Ill. 252, 89 N.E. 425, 24 L.R.A. N.S. 978, 132 Am. St. Rep. 204 (1909), live wire in street knocked by policeman with club against plaintiff.

Illustration 9 is taken from Klaman v. Hitchcock, 181 Minn. 109, 231 N.W. 716 (1930).

Illustration 10 is taken from Cole v. German Savings & Loan Society, 124 F. 113, 63 L.R.A. 416 (8 Cir. 1903).

CROSS REFERENCES: ALR Annotations:

Liability of carrier responsible for passenger leaving train or car at station other than his destination for subsequent injury to, or illness or death of, passenger. 118 A.L.R. 1327.
Proximate cause of injury to traveler from collision with privately owned pole standing within boundaries of highway. 3 A.L.R.2d 6, 56.
Liability of person obstructing stream, ravine, or similar area by debris or waste, for damages caused by flooding or the like. 29 A.L.R.2d 447.

Digest System Key Numbers:

Negligence 62(1) et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Torts > Negligence > Causation > Proximate Cause > Intervening Causation

Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 16 - The Causal Relation Necessary to Responsibility for Negligence

Topic 1 - Causal Relation Necessary to the Existence of Liability for Another's Harm

Title C - Superseding Cause

Restat 2d of Torts, § 447

§ 447 Negligence of Intervening Acts§ 447 Negligence of Intervening Acts

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

COMMENTS & ILLUSTRATIONS: Comment on Clause (a):

a. The statement in Clause (a) applies where there is a realizable likelihood of such an act but the likelihood is not enough in itself to make the actor's conduct negligent, the conduct being negligent because of other and greater risks which it entails. If the realizable likelihood that a third person will act in the negligent manner in which a particular third person acts is so great as to be the risk or even one of the risks which make the actor's conduct unreasonably dangerous and therefore negligent, the case is governed by the rule stated in § 449.

Illustration:

1. A loads his truck so carelessly that a slight jolt might cause its heavy contents to fall from it. He parks it in a street where to his knowledge small boys congregate for play. B, one of these boys, tries to climb on the truck. In so doing he so disturbs the load as to cause a heavy article to fall upon and hurt C, a comrade standing close by. B's act is not a superseding cause of C's harm.

Comment on Clause (b):

b. The actor at the time of his negligence may have no reason to realize that a third person might act in the particular negligent manner in which the particular third person acts, because his mind is not centered upon the sequence of events which may result from his act and therefore he

has no reason to realize that it will create the situation which the third person's intervening act makes harmful. However, when the situation is known to exist, the likelihood that some negligent act may make it dangerous may be easily realizable or even obvious.

Illustration:

2. The same facts as in Illustration 1, except that A does not intentionally park his car in the street frequented by the boys, but his car through no fault of his is blocked in a traffic congestion at this point. B's act in meddling with the truck is not a superseding cause of C's harm.

Comment on Clause (c):

c. The word "normal" is used in the sense stated in § 443, Comment *b*. It, therefore, denotes that the court or jury looking at the matter after the event and knowing the situation which existed when the act was done, including the character of the person subjected to the stimulus of the situation, would not regard it as extraordinary that such an act, though negligent, should have been done.

d. The words "situation created by the actor's negligence" are used in the sense stated in § 442, Comment *d*.

e. The words "extraordinarily negligent" denote the fact that men of ordinary experience and reasonable judgment, looking at the matter after the event and taking into account the prevalence of that "occasional negligence, which is one of the incidents of human life," would not regard it as extraordinary that the third person's intervening act should have been done in the negligent manner in which it was done. Since the third person's action is a product of the actor's negligent conduct, there is good reason for holding him responsible for its effects, even though it be done in a negligent manner, unless the nature or extent of the negligence is altogether unusual.

f. The statement in Clause (c) applies to any negligent act which is a normal consequence of a situation which the actor's negligent conduct is a substantial factor in creating (see §§ 443-446).

g. While the fact that such an intervening act of a third person is negligent does not prevent the actor's negligent conduct from being a legal cause of the harm resulting therefrom to another, the negligence of the act may be so great or the third person's conduct so reckless as to make it appear an extraordinary response to the situation created by the actor and therefore a superseding cause of the other's harm.

h. The rule stated in this Section applies to acts done either by the person who is harmed or by a third person. If the act is done by the injured person and is done in a negligent manner, it does not prevent the actor's negligence from being a legal cause of his harm, but it constitutes contributory fault which precludes him from recovering from the negligent actor (see § 467). If it is done by a third person, he, as well as the actor whose negligence has created the situation, is liable to another injured by it.

REPORTERS NOTES: The Reporter's Note to this Section, found in Tentative Draft No. 8 (1932), was as follows:

Clauses (a) and (b) of this Section are supported by the following cases:

Gulf, C. & S. F. R. Co. v. Ballew, 39 S.W.2d 180 (Tex. Civ. App. 1931), affirmed, 66 S.W.2d 659 (Tex. Comm. App.). Defendant's train was so negligently coupled that any sudden stop might cause it to break in two. The plaintiff was injured by the breaking of the train through sudden stoppage resulting in the following manner: The train was an excursion train carrying students to a football game. One of them tried to pass from one car to another. The vestibule doors were closed and he attempted to crawl through the two open transoms. In doing so he inadvertently pulled the cord of the emergency brake, thereby stopping the train.

Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N.E. 612 (1929). Defendant, in filling the tank of a Ford car, negligently spilled gasoline on the motor. The car had a short circuit of which the defendant knew nothing. A friend of the plaintiff who knew of the short circuit cranked the car, causing a spark which ignited the gasoline, burning the plaintiff.

Lane v. Atlantic Works, 111 Mass. 136 (1872). A heavy object was thrown down upon plaintiff by the negligent interference of a playmate who, though a child, was of sufficient age to be negligent in so doing.

In Illidge v. Goodwin, 5 C. & P. 190, 172 Eng. Rep. 934 (1831), horses negligently abandoned were left unattended and set in motion by an adult third person. See also Hale v. Pacific Tel. & Tel. Co., 42 Cal. App. 55, 59, 183 P. 280 (1919).

Kliebenstein v. Iowa R. & L. Co., 193 Iowa 892, 188 N.W. 129 (1922), and Mooney v. Seattle, R. & S. Ry., 47 Wash. 540, 92 P. 408 (1907). Street cars left unattended were set in motion by third persons.

Denker v. Lowe, 192 Ky. 660, 234 S.W. 294 (1921); City of Carterville v. Cook, 129 Ill. 152, 22 N.E. 14, 4 L.R.A. 721, 16 Am. St. Rep. 248 (1889); and Howe v. Ohmart, 7 Ind. App. 32, 43, 33 N.E. 466 (1893). Plaintiff was forced by the negligence of a third party into an excavation or other dangerous condition negligently created upon a highway or immediately adjacent to it.

Quaker Oats Co. v. Grice, 195 F. 441 (2 Cir. 1912); Watson v. Kentucky & Ind. Bridge & R. Co., 137 Ky. 619, 126 S.W. 146, 129 S.W. 341 (1910); Bradley v. Shreveport Gas, Electric Light & Power Co., 142 La. 49, 76 So. 230 (1917). Inflammable or explosive substances were ignited or exploded by the negligence of third persons.

Thomas v. Southern Pa. Traction Co., 270 Pa. 146, 112 A. 918 (1921). Passenger on a street car thrown into the street by the negligence of the motorman, and run over by an automobile carelessly driven by a third person. Compare with this South Side Pass. R. Co. v. Trich, 117 Pa. 390, 11 A. 627, 2 Am. St. Rep. 672 (1887), in which it was held that a runaway horse which ran over the plaintiff was a superseding cause. This, however, was explained on the ground that a runaway horse was an extraordinary incident of traffic.

Owens v. Cerullo, 9 N.J. Misc. 776, 155 A. 759 (1931). Plaintiff was injured when his car was involved in a collision due to the defendant's negligence, and he was then run into by a second negligently driven car.

Clause (c) of this Section is supported by Clark v. Chambers, L.R. 3 Q.B. 327 (1878); Collins v. Middle Level Commissioners, L.R. 4 C.P. 279 (1869); Fishburn v. Burlington R. Co., 127 Iowa 483, 103 N.W. 481 (1905); Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469 (1884); Henry v. Dennis, 93 Ind. 452, 47 Am. Rep. 378 (1884); Harton v. Forrest City Tel. Co., 146 N.C. 429, 59 S.E. 1022, 14 L.R.A. N.S. 956, 14 Ann. Cas. 390 (1907); Turner v. Page, 186 Mass. 600, 72 N.E. 329 (1904); Koelsch v. Philadelphia Co., 152 Pa. 355, 25 A. 522, 18 L.R.A. 759, 34 Am. St. Rep. 653 (1893); Webb v. City of Chanute, 118 Kan. 505, 235 P. 838 (1925). But see Lord Sumner in Singleton Abbey v. S. S. Paludina, [1927] A.C. 16, to the effect that the negligent navigation of a ship in its efforts to extricate itself from a predicament caused by the defendant's negligence is a superseding cause unless the efforts are made during a sudden emergency.

CROSS REFERENCES: ALR Annotations:

Negligence causing automobile accident, or negligence of driver subsequently approaching scene of accident, as proximate cause of injury by or to the approaching car or to its occupants. 58 A.L.R.2d 270.
Liability as affected by interference by outside agency with object abandoned or temporarily left in public street or park. 158 A.L.R. 880.

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Negligence 62(3)

Legal Topics:

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Torts > Negligence > Causation > Proximate Cause > Intervening Causation

CERTIFICATE OF MAILING AND SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 21st day of April, 2016, I arranged for mailing via U.S. mail to Division II Court of Appeals and service *via E-mail (per Stipulated E-Service Agreement) and U.S. mail as indicated* of the foregoing REPLY BRIEF OF APPELLANT SAFWAY SERVICES, LLC as follows:

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